

F. M. S. REPORTS.

[ORIGINAL CIVIL JURISDICTION]

BURTON, J.

September 3, 1934.

G. L. O'HARA HICKSON.....Petitioner.

v.

O'HARA HICKSON.....Respondent.

LEVINSONAS Co-Respondent.

[SELANGOR DIVORCE SUIT No. 2 of 1934]

The Divorce Enactment, 1923—Domicil—Intention to acquire Domicil of Choice—Evidence—Declaration of Intention.

The petitioner, a rubber planter in Selangor, was born in Ireland in 1887, and his domicil of origin was the Irish Free State. He went abroad in 1906, returned to Ireland for four months in 1913, again for five weeks in 1919, and since then had never been back to Ireland.

His declared intentions were to spend the rest of his life as a planter in Selangor and on retirement, although he had made no plans as to that, to settle in this country.

Held, that the petitioner had failed to prove that he had abandoned his domicil of origin and acquired a domicil of choice in Selangor.

F. G. Charlesworth for the petitioner.

Respondent absent.

Co-Respondent absent.

Cur. Ad. Vult.

BURTON, J.—This is an undefended case in which the petitioner seeks for a dissolution of his marriage with Irma O'Hara Hickson on the ground of adultery with Levas Levinsonas. The question of difficulty in this case, and it is a preliminary question, is whether the petitioner is domiciled in the State of Selangor, for unless he has acquired a Selangor domicil this Court has no jurisdiction to decree dissolution of the marriage. The petitioner's domicil of origin is the Irish Free State. He was born at Fermoy on 9th March, 1887 of a Protestant Irish family.

The facts on which he seeks to prove his change of domicil are as follows:—

He first went abroad in 1906 and returned to Ireland in 1913 when he spent four months there with his family. He returned again in 1919 after the war, but left after a five weeks stay disgusted with the state of the country under Sinn Fein rule. His brother had been turned out of the farm at Fermoy by the Sinn Fein. He then decided never to return to Ireland, although his mother is still resident there. His father is dead and he has quarrelled with his mother over the marriage which he is now seeking to dissolve.

His troubles with his wife have crippled him financially, and he is in debt to the extent of £550/- to the Company which employs him. Holidays in Europe have recently been spent in Guernsey. The son of this marriage is being educated in New Zealand. He sees no possibility

of retiring, and has made up his mind to live the rest of his working life on Bhutan Estate. If forced to retire, he says he intends to live in this country.

I have considered this evidence very anxiously in the light of the authorities cited to me by Mr. Charlesworth, and many others which I have found for myself, and I have come to the conclusion that the petitioner has not satisfied me that he has abandoned his Irish domicil of origin and acquired a domicil of choice in Selangor.

The question before me is—Has the petitioner a settled purpose of making Selangor his fixed and permanent abode?

The petitioner I thought a candid witness, and I am prepared to accept what he says. I have to consider whether the facts he has put before me are sufficient to prove the acquisition of a domicil of choice in Selangor.

In *Winans v. The Attorney General*, (1904) A. C. 287, at page 291 Lord Macnaghten says:—

“It must be, to quote Lord Westbury again, a ‘fixed and settled purpose.’ ‘And,’ says his Lordship, ‘unless you are able to show that with perfect clearness and satisfaction to yourselves, it follows that a domicil of origin continues.’ So heavy is the burden cast upon those who seek to show that the domicil of origin has been superseded by a domicil of choice! And rightly, I think. A change of domicil is a serious matter.”

And I do not think the burden is any less when the question is whether a Northern European has acquired a tropical domicil. The Tropics are admittedly unsuitable for a European who has passed the prime of life, and the adoption of a local domicil by a European is of the rarest occurrence. I am satisfied that the petitioner has made a settled home for the time being on Bhutan Estate. But he is 47 years old and in the nature of things he cannot expect to reside permanently there. It is unlikely that he will be able to retain that appointment much more than 10 years from now. Very few Europeans who have spent the whole of their life in this country continue so long.

I think it is important to consider what are his intentions when he is forced to give up the management of Bhutan Estate and his residence there. Lord Westbury said in *Bell v. Kennedy*, L.R. 1 H.L. Sc. 307, at page 321:—

“Now, residence and domicil are two perfectly distinct things.....For although residence may be some small *prima facie* proof of domicile, it is by no means to be inferred from the fact of residence that domicile results, even although you do not find that the party had any other residence in existence or in contemplation.”

And again at page 458:—

"Domicil of choice is a conclusion or inference which the law derives from the fact of a man fixing voluntarily his sole or chief residence in a particular place, with an intention of continuing to reside there for an unlimited time. This is a description of circumstances which create or constitute a domicil, and not a definition of the term. There must be a residence freely chosen, and not prescribed or dictated by any external necessity, such as the duties of office, the demands of creditors, or the relief from illness; and it must be residence fixed not for a limited period or particular purpose, but general and indefinite in its future contemplation."

Now I have no doubt that the petitioner is perfectly sincere in his declaration that he intends to stay on Bhutan Estate as long as possible. But I do not think that this is strong evidence of his intention to choose a domicil in Selangor because his residence there is dictated by the necessity of earning his living, and, as he admits himself, it must come to an end. He says:—

"When I have to retire I propose to settle in this country, but I have made no plans about that. That is my fixed intention."

As to the value of such a declaration see the judgment of Merrivale, P. in *Bryce v. Bryce*, (1933) P. 83, at page 85:—

"I have considered in the light of the authorities what weight should be attached to evidence of declarations of intention."

And he goes on to cite a dictum of Dr. Lushington in *Hodgson v. De Beauchesne*, (1858) 12 Moo., P. C. 285, at page 325:—

"Such evidence, though admissible, has been considered by many authorities as the lowest species of evidence."

See also Lord Buckmaster's remarks in *Ross v. Ross*, (1933) A.C. 1, at page 6 and Elphinstone, C.J. in *David v. David*, Selangor Divorce, No. 3 of 1931 (unreported) where he says:—

"I feel that I cannot disregard the fact that the temptation for a person in the position of the petitioner who desires to obtain a divorce to say that he has changed his domicil must be very great."

But anyhow I do not think the intention is sufficiently definite. He must show an *animus manendi* in Selangor, and I cannot deduce from his words an intention of settling in Selangor to the exclusion of the rest of Malaya. There may be suitable places in Selangor for the inhabitant of a temperate climate to spend his declining years, but of the places where we might expect

a European to take up a permanent abode Fraser's Hill is very largely and Cameron's Highlands wholly in Pahang. It seems to me that there cannot be inferred from his words more than a vague intention to settle somewhere in Malaya, or at the highest somewhere in the Federated Malay States. But even that is not enough. I come to the conclusion, therefore, that this petition should be dismissed.

Petition dismissed.

[APPELLATE CIVIL JURISDICTION.]

BURTON, J.

September 20, 1934.

G. H. S. FRIPP.....Appellant.

v.

A. B. NICHOLAS.....Respondent.

[SELANGOR MAGISTRATE'S CIVIL APPEAL

No. 27 of 1934]

Clerk-conductor of rubber estate occupying house on the estate—Tenancy at will—Termination of tenancy by dismissal from the estate—Forcible ejectment.

The appellant and respondent were respectively manager and clerk-conductor of a rubber estate. The respondent was given the option of occupying a house on the estate or a house in the village and receiving \$25/- per month towards the rent. Respondent chose the former alternative and occupied a house on the estate.

On the 6th April, 1934, appellant summarily dismissed the respondent and ordered him to leave the estate forthwith. Respondent did not comply with this order and was forcibly ejected from his house by the appellant on the 7th April, 1934.

On appeal from the decision of the Magistrate awarding damages in respect of this forcible ejectment:—

Held. that the respondent held the tenancy of the house whilst he was clerk-conductor as a tenant at will and that on receiving notice of dismissal his tenancy was determined.

By remaining he became a trespasser and could have no right of action against the appellant for forcible ejectment.

B. J. P. Joaquim for the appellant.

S. M. Sharma for the respondent.

Cur. Ad. Vult.

BURTON, J.—This is an appeal from the judgment of the Magistrate, Kajang, awarding the sum of \$500/- damages against the appellant for forcibly ejecting him from his house on Rinching Estate.

The respondent was engaged as Clerk and Conductor on the estate in August, 1933, by the predecessor of the appellant at a salary of \$100/- a month. He has a wife and nine children to support and the question arose as to the accommodation of his family. It would appear that the house usually occupied by the conductor was not large enough for the respondent and his family, and after negotiations, during which he was